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Supreme Court of the United States

October Term, 1958

No. 501

HARRY DREIS, as executor under the last Will and Testament of MILDRED T. BISHOP, deceased,

Petitioner,

against

ETHEL MAY BISHOP, individually and as Administratrix C.T.A. of the Estate of Cory Bishop, deceased.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OSMOND K. FRAENKEL,
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OSMOND K. FRAENKEL,
HARRY DREIS,
of Counsel.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit which reversed a judgment of the District Court for the Virgin Islands in favor of petitioner's testatrix and dismissed her complaint.

(a) The Opinions Below

The opinion of the District Court is reported at 152 F. Supp. 4. The opinions of the Court of Appeals are reported at 257 F. 2d 495. Copies are annexed (see pp. 17-47 *infra*).

(b) Statement of Grounds of Jurisdiction

(i) The judgment of the Court of Appeals was rendered and entered on May 1, 1958.

(ii) Timely application for rehearing was made and denied on August 19, 1958.

(iii) The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254.

(iv) The original plaintiff died on July 6, 1958; petitioner was appointed her executor by the District Court of the Virgin Islands on July 11, 1958 and substituted as party plaintiff herein by order of said Court entered on October 10, 1958, a copy of which is hereto annexed (see p. 49, *infra*).

(c) Questions Presented for Review

1. Is a plaintiff-owner in common of an undivided half interest in a parcel of real estate precluded from invoking equitable relief to have a deed set aside on the ground of fraud because she was persuaded by one of the persons who defrauded her to sign the deed so as to assist that person in preventing his wife from obtaining the real estate where there is no claim that the wife had any interest in plaintiff-owner's half?

2. May the Court of Appeals raise an issue with respect to clean hands when no such issue had been tendered in the District Court, thus replacing its own discretion and conscience for that of the District Court?

3. May a complaint be dismissed by the Court of Appeals where one of the alternative grounds for relief found in plaintiff's favor by the District Court was never passed upon by the Court of Appeals?

4. Does a deed to one as trustee which does not name or describe a beneficiary or the terms of the trust create any title as against a resulting trust in the original grantor?

5. May the Court of Appeals make its own independent finding of fact that the intent of the plaintiff-owner was to assist in the commission of a fraud where there is no evidence of such intent and the trial court found otherwise?

6. May the Court of Appeals set aside a finding that fraud was committed by one of the defendants where there was evidence which, viewed in the light most favorable to plaintiff-owner sustained the trial court's finding?

(d) Statutes Relied On

Rule 52. *Findings by the Court.*

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *

Code of Laws for St. Thomas & St. John Title II, Chapter Eight, Sec. 4, p. 19 (now 28 VI Code [illegible]

The question of fraudulent intent in all cases arising under the provisions of the Code shall be deemed a question of Fact, and not of Law.

(e) Statement of the Case

Petitioner's testatrix (whom, for convenience, we shall hereafter refer to as Mildred) brought suit in the District Court for the Virgin Islands to set aside a trust deed of an

undivided half interest held by her in common in a 55 parcel acre of land and for partition (14a). Mildred had acquired this half interest by a purchase made in the names of herself and Cory Bishop, to whom she believed herself married. In 1955 Cory induced her by representations found by the District Court to have been fraudulent to join with him in a conveyance of this property to one Kelly as trustee. The deed named no beneficiary and stated no terms of trust. Kelly was the attorney for Bishop's real wife, the defendant Ethel May. The trust was revoked (without Mildred's consent) and the property conveyed to Ethel May. After Ethel May took possession of it this suit was commenced.

Cory (whose real name was Below) and Ethel May had been married in 1925. In 1938 Cory deserted her (29a). He met Mildred in New York in 1938, went through a marriage ceremony in 1939 and took her with him to the Virgin Islands in 1940. Thereafter they acquired various properties, including the 55 acres here in question. Most of the funds used were contributed by Mildred (32b, 33b). Title was held as tenants in common (30a). In 1954 they separated. In 1955 Ethel May retained George T. Kelly, of Orlando, Florida, to try to locate Cory, having obtained information that he was in the Virgin Islands. As a result, upon learning that she had located him, Cory went to see her in Florida and offered to convey his property to her (42b). She then sent her lawyer Kelly to the Virgin Islands and gave him a power of attorney to act on her behalf (43b).

Kelly came to St. Thomas and conferred with Cory's attorney, Bailey. The latter prepared a deed which purported to convey the interest of both Cory and Mildred to Kelly as trustee (25b-28b). The deed did not declare the terms of the trust or name any beneficiary (1b). Cory obtained Mildred's signature by playing on her emotions. He told her that she had never been really married to him,

that his real wife had turned up and was pursuing him. He said that to protect him from "blackmail" by his wife and to protect Mildred's interest in the property, it should be conveyed in trust. She agreed as she trusted him and was sorry for him (36b-39b).

Thereafter Kelly executed a declaration (which is not in evidence) that he held the property for Ethel May for life, with remainder to her daughter (11a). Ethel May then executed a release of her dower rights in all the land which Cory had previously sold. She, Cory and the daughter purported to revoke the trust and to convey the entire property, including Mildred's half, to Ethel May free of the trust (4b-6b). Cory died in September 1956 (13a). Ethel May had come to the Virgin Islands shortly before that and occupied the land in question. Then this suit was instituted.

At the trial both Ethel May and Mildred testified, but Kelly defaulted and did not testify (30a).

The District Court found that Mildred had been defrauded by Cory and also by Ethel May through Kelly, her lawyer (32a-34a). It ruled that the deed was also void for uncertainty (34a-35a). Judgment was entered in favor of Mildred annulling the deed as to her one-half interest and directing partition (26a, 27a).

The Court of Appeals unanimously reversed and dismissed the complaint on the sole ground (not raised below) that Mildred had not come into court with clean hands and made its own independent finding *sue sponte* that Mildred had participated in Cory's apparent intention to defraud Ethel May. The Court also reversed the District Court finding that Ethel May and her lawyer had participated in Cory's fraud.

On application for reargument the case was considered and two additional judges brought in (Biggs, *C.J.* and Hastie, *J.*). These dissented from the denial of the appli-

cation. They held that the clean hands doctrine had no application to Mildred since Ethel May never had any claim to Mildred's interest in the property. Judge Biggs concluded that the court had abused its discretion in overruling the conclusions of the District Court. Chief Judge Biggs also held that the deed was void because no valid trust had been created. The majority had not dealt with that issue at all.

Mildred, and now her estate, has thus, without any consideration, lost her property to some one who never had any right or claim to it whatever.

(f) Jurisdiction of the Court Below

The District Court had jurisdiction of this case under § 1406 of Title 48 of the United States Code and under Code of Laws for St. Thomas and St. John, Title III, Chap. Thirty-seven, page 196 and Chap. Forty-two, page 204.

Reasons for Granting the Writ

The court below has decided an important question of Virgin Islands real property and equity law in conflict with the applicable territorial law. And it has departed from the accepted and usual course of judicial proceedings prescribed by Federal Rule 52(a) and in conflict with the views announced by this Court and followed in most Circuits. Thus it has usurped the equity powers of the District Court in making its own findings of fact, in reversing a finding of fraud made by the District Court, and in applying the "clean hands" doctrine, especially since no issue of clean hands had been tendered to the District Court. Moreover, the Court of Appeals dismissed the partition suit brought by Mildred without at all passing upon one of the alternative grounds of that suit, namely, the invalidity of her deed in trust because no beneficiary had been named or terms of trust stated.

As Chief Judge Biggs said in his dissent (see *infra*, p. 46):

> "The rulings of the court would seem to err in three major areas and dislocate general legal principles and also the law of the Virgin Islands as heretofore carefully established by this very court."

1. As pointed out in the dissenting opinion, Virgin Islands law is that embodied in the Restatements of the American Law Institute (*Callwood* v. *Virgin Islands Nat'l Bank*, 221 F. 2d 770, 774-775; V. I. Code, Vol. I, Title 1, Section 4).

Section 63 of the Restatement, Trusts, provides that a trust is invalid when made for the purpose of defrauding anyone. But in discussing this the comments make clear that when in fact no valid claim existed then the settlor can require the trustee to reconvey:

> "If the transfer was made for the purpose of preventing a particular person from enforcing a claim against the property, and the claim could not have been enforced against the property, although the transferor believed that it could be so enforced, the transferor can compel the transferee to perform the trust. This is true whether the particular claim was unfounded or although enforceable it could not have been enforced against the particular property. Thus, if a person, believing that he is liable in tort to a third person for an act of his employee, transfers his property to another who agrees to hold it in trust for him and the purpose of the transferor in making the transfer was to prevent the third person from attaching the property, the transferor can compel the transferee to reconvey the property if in fact he was not liable to the third person, although he believed that he was liable. So also, if the owner of a piece of land transfers it to another who agrees to hold it in trust for the transferor, and the purpose of the transferor in making the transfer was to prevent a judgment creditor from levying execution upon the land, the transferor

can compel the transferee to reconvey the land if it was a homestead of the transferor's upon which the creditor could not have levied execution" (pp. 200, 201).

That statement reflects the well settled law on the subject:

Ferguson v. *Little Rock Trust Co.*, 99 Ark. 45, 137 S. W. 555;
Berniker v. *Berniker* (Cal.), 174 P. 2d 668, aff'd 30 Cal. 2d 439, 182 P. 2d 557;
Rossow v. *Peters*, 277 Ill. 436, 115 N. E. 524;
Warner v. *Tullis*, 206 Iowa 680, 218 N. W. 575;
Gunderman v. *Gunnison*, 39 Mich. 313;
Mentzner v. *Mentzner*, 325 Mo. 941, 30 S. W. 2d 146;
Weinhart v. *Weinhart*, 193 Misc. (N. Y.) 424, 84 N. Y. S. 2d 375, aff'd 275 App. Div. 994, 90 N. Y. S. 2d 918.
Brady v. *Ellison*, 3 N. C. 348;
Gilpatrick v. *Hatter* (Okl.), 258 P. 2d 1200;
Hanscom v. *Hanscom*, 186 Or. 541, 208 P. 2d 330;
Rivera v. *White*, 94 Tex. 538, 63 S. W. 125
Wantulok v. *Wantulok*, 67 Wyo. 22, id. 45, 214 P. 2d 477, 223 id. 1030.

As was said in the *Berniker* case at 174 P. 2d 761:

"In order that a transferor of property be prevented from recovering it from the person to whom it has been transferred in trust not only must there be an intent to avoid claims of creditors but there must be enforcible claims. A mere intent without the presence of something on which the intent may operate is not sufficient."

In 1 Scott on Trusts § 63, p. 399, the rule is thus stated:

"Where the owner of property transfers it in trust for himself for the purpose of avoiding a claim

against him which he believes to be and which is in fact not an enforceable claim, the trust is not illegal. By the weight of authority it is held that the trust is not illegal if the claim is not in fact enforceable even though the settlor believes that it is. In such a case his state of mind is as bad as though the claim were enforceable, but the courts hesitate to impose upon him the penalty of forfeiting his interest in the property. The result is the same where, even though the claim is enforceable, it is not enforceable against the property which he transfers is trust."

No one of the cases cited in the opinion of the Court of Appeals justifies the conclusion reached by it. In all of them that have any bearing here, suit was brought by persons who were heavily indebted and sought to hide their property. The statement by this Court in *Precision Co.* v. *Automotive Co.*, 324 U. S. 806, 814, has no application whatever to this case. That dealt with patents and, therefore, concerned the public interest (*id.* 815).

It thus appears that the Court of Appeals has disregarded well settled principles of law and created uncertainty in the law of property affecting not only the Virgin Islands but all the states within its jurisdiction, to the extent that litigation involving such questions might reach the federal courts.

The Court of Appeals has, indeed, applied the "unclean hands" doctrine in a rigid, arbitrary manner to punish Mildred. That disregards this Court's admonition in *Johnson* v. *Yellow Cab Co.*, 321 U. S. 383, at 387:

> "The maxim that he who comes into equity must come with clean hands is not applied by way of punishment for an unclean litigant but 'upon considerations that make for the advancement for right and justice.' Keystone Driller Co. v. General Excavator Co., 290 U. S. 240, 245. It is not a rigid formula which 'trammels the free and just exercise of discretion' ibid 245, 246. Therefore before deciding the applicability of the maxim to the case at hand, we

must examine the particular transactions and circumstances involved together with the federal laws which are alleged to taint these transactions with illegality."

2. Moreover, the Court of Appeals had no power to substitute its discretion for that of the District Court by raising the "unclean hands" issue *sua sponte*.

No such issue was raised by Ethel May in the pleadings (see 16a, 17a, 18a), nor at the trial (see 23a, 23b). It was not proper for the Court of Appeals to consider it for the first time on its own motion.

In *Sears Roebuck v. Blade*, 139 Cal. App. 2d 580, 294 P. 2d 140, 148, the Court said:

> "This defense (unclean hands) must ordinarily be raised in the trial court to be available, and cannot, as here, be raised for the first time on appeal (citing numerous cases). It has been held in one case, Katz v. Carleson, 84 Cal. App. 2d 469, 191 P. 2d 541, that in a clear case involving flagrantly unconscionable conduct, a court may *sua sponte* apply the 'clean hands doctrine'."

No such flagrant case existed here.

The cases relied on by the court below (see *infra*, p. 37) do not support its position. In *Frank Adam El. Co. v. Westinghouse Co.*, 146 F. 2d 165, the issue of unclean hands was raised in the District Court. Moreover, the Court of Appeals did not purport to decide it but remanded the case to the District Court to decide it. And that case, unlike this, involved a public interest. In *Gluck v. Ryuda Development Co.*, 99 N. J. Eq. 788, aff'd 100 N. J. Eq. 554, the issue was decided by the trial court, and had, in effect, been raised in the pleadings. In the *Automotive Precision* case, *supra*, also a case involving the public interest, the issue of unclean hands had been pleaded and decided adversely to plaintiff in the District Court. Thus

no one of these cases supports the view of the court below that it had power to dismiss a complaint of its own motion where no public interest was involved and no claim of unclean hands had been presented to the District Court.

3. The Court of Appeals should not have dismissed the partition suit without passing on the alternative ground for relief relied on by Mildred—that the "trust" deed to Kelly was void for uncertainty because no beneficiary was named or terms of trust stated (12a). The District Court had sustained this ground of relief (34a, 35a) and directed partition (27a). It was clearly a sufficient basis for relief even if the deed by Mildred to Kelly was not subject to attack on the ground of fraud.

The law is clear and was stated by Chief Judge Biggs in his dissent. See 2 Scott Trusts § 112 and cases cited by the District Court (*infra*, pp. 26, 27).

4. In so far as the Court of Appeals may have rested its decision on a finding (which, under the local Code, is one of fact—see p. 3, *supra*) that Mildred had an intent to defraud Ethel May that went beyond the protection of Mildred's own interest (to which Ethel May concededly had no claim), it violated, as we shall show hereafter, the plain command of the Rules of Civil Procedure as these have been interpreted by this Court and almost all the other Courts of Appeals.

The Rules of Procedure provide [No. 52(a)] that, where a case is, as here, tried without a jury the facts found "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses".

As this Court said in *United States* v. *Yellow Cab Co.*, 338 U. S. 338, at 341:

> "Findings as to the design, motive and *intent* with which men act depend peculiarly upon the credit

given to witnesses by those who see and hear them. If defendants' witnesses spoke the truth, the findings are admittedly justified. The trial court listened to and observed the officers who had made the records from which the Government would draw an inference of guilt and concluded that they bear a different meaning from that for which the Government contends." (Emphasis ours.)

To like effect are *United States* v. *Oregon Medical Society*, 343 U. S. 326, and *United States* v. *duPont & Co.*, 351 U. S. 377.

We submit that this rule was violated by the Court below in two respects: by its own finding with respect to the intent of Mildred; by its rejection of the express finding of the trial court that Ethel May and Kelly had participated in Cory's fraud.

In almost all the other Circuits Rule 52(a) has been interpreted to mean that the Court of Appeals has no power to review the evidence except to determine whether the findings below were supported by substantial evidence and whether the inferences made by the trial court had any rational basis. As is often said, all favorable inferences must be made in favor of the successful party.

Thus, in *Daniel* v. *United States*, 234 F. 2d 102 (5th Cir.) c.d. 352 U. S. 971, the Court said at p. 106 that it had the duty "to view the testimony and inferences therefrom in the light most favorable to the prevailing party below".

In *Buchanan* v. *Wilson*, 254 F. 2d 849, the Sixth Circuit expressed the same view of the limits on its power of review.

In *Moths* v. *United States*, 179 F. 2d 824 (7th Cir.), the Court said at page 827: "We have repeatedly held that we will not disturb the findings of a trial judge unless they cannot be sustained upon any rational view of all the evi-

dence including all reasonable inferences of which the testimony is susceptible".

The Eighth Circuit has also uniformly adhered to this view: *United States* v. *Fotopulos*, 180 F. 2d 631; *Imperial Assur. Co. of New York* v. *Joseph Supornick & Son, Inc.*, 184 F. 2d 930; *Higgins* v. *Kitterman*, 257 F. 2d 861. In the first of these cases the Court said at page 635: " * * * any attempt on the part of the appellate court to 'draw an inference of fact constitutes a usurpation of the province of the trial court' ".

To like effect are *Paramount Pest Control Serv.* v. *Brewer*, 177 F. 2d 564 (9th Cir.), *Widney* v. *United States*, 178 F. 2d 880 (10th Cir.), and *United States* v. *Ingalls*, 114 F. 2d 839 (D. C. Cir.). See also *United States* v. *Abel*, 258 F. 2d 485, 494 (2d Cir.).

Only the Third Circuit appears to act on a contrary view of the law. Even before the decision at bar it had held that it could draw its own inferences from the facts: *Sears, Roebuck & Co.* v. *Johnson*, 219 F. 2d 590; *Perfect-form Corporation* v. *Perfect Brassiere Co.*, 256 F. 2d 736.

Here that Court has gone even further. In rejecting the trial court's express finding that Kelly and, through him, Ethel May were implicated in Cory's fraud, it acted as though free to make its own appraisal of the evidence. For it said only that the evidence was "entirely consistent" with an effort on the part of Ethel May and her lawyer to secure redress from Cory. Of course they were seeking redress from Cory in attempting to obtain his own property, but the trial court had a perfect right to find, as it did, that in the process of doing this they deliberately assisted Cory in defrauding Mildred of her property. For the Court of Appeals completely ignores the significant fact of the careful omission from the deed of trust of any reference to Ethel May or of any mention of a beneficiary.

Kelly was, of course, aware of this omission. He was present in the office of Bailey, the local lawyer who drew

it, and, as Bailey testified: "Mr. Kelly read it and approved of it (*sic*) on behalf of himself and his client for (*sic*) whom he was representing" (27b). Kelly did not appear at the trial (30a). Since it had previously been agreed between Cory and Ethel May that the property should be placed in trust for her (44b), it was perfectly obvious that by failing to mention her name in the deed a fraud could be perpetrated on Mildred. The inference that this was intended was a proper one for the District Court to make. And it did make it, saying (*infra*, pp. 23-24):

> "* * * George T. Kelly III was Ethel May Bishop's attorney and agent with full power of attorney from her to act fully in her behalf in obtaining the deed, and so acted. Consequently, although he may not have personally made any of the false representations to Mildred T. Bishop, he aided in them and made them possible by keeping Ethel May Bishop's name out of the original trust deed, and by handling the transaction so that her name need not be known until he made his declaration of trust ten days later. He acted as Ethel May Bishop's agent with full power of attorney to act for her. Therefore, his acts became her own acts. She is here attempting to disavow these fraudulent acts of her agent, but to keep all benefits therefrom."

For the Court of Appeals to have rejected this finding and make a contrary one was usurpation of the function of the District Court.

Equally beyond its function was the implication that Mildred had an "intent" to defraud Ethel May. The only evidence is that Mildred sought to protect her own interest. To that interest Ethel May had no claim whatever. As noted by Chief Judge Biggs in his dissent, the entire reliance of the Court of Appeals was on two isolated bits of testimony by Mildred: that "a trust is something that keeps things from people * * *"; "to protect our interest". But in the light of the entire testimony this does not compel

an inference of fraud on Mildred's part. Only if no other inference was reasonable could the Court of Appeals substitute its judgment for that of the court below. Under the settled rule it was the trial court's function to draw inferences from the whole testimony. It was, therefore, fully justified in concluding, as it necessarily did, that Mildred was concerned only to protect her own half interest in the property and had no intent to defraud Ethel May of any dower right she might have in Cory's half. It should be observed that, since the deed to Cory and Mildred was on record, nothing that happened afterwards could affect any dower right to which Ethel May might be entitled in Cory's half.

The views of the court below, therefore, conflict with those expressed by this Court and almost all the other Circuits. That conflict should be resolved by this Court in the interest of uniformity in the administration of justice in the federal courts.

For the foregoing reasons, it is respectfully requested that a writ issue to review the decision below.

Respectfully submitted,

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Counsel for Petitioner.

OSMOND K. FRAENKEL,
HARRY DREIS,
Of Counsel.

APPENDIX

Opinion of District Court

The complaint herein was filed on June 25, 1956, Harry Dreis, Esquire, as attorney for plaintiff. Named in the complaint are the following defendants:

(a) Corey Bishop, who filed an appearance and answer, dated September 11, 1956, which states that he "Waives all further notice and as and for his answer to the complaint alleges as follows: That he "Admits the allegations contained in the complaint, numbered 1, 2, 13 and 17," and states that he "Neither admits nor denies the allegations contained in the other allegations of the complaint."

(b) George T. Kelly III, who was personally served in Orange County, Florida, and who has not appeared or answered in the case.

(c) Ethel May Pressey Below, also known as Ethel May Bishop, who appeared and answered, and who was represented by her attorney Croxton Williams, Esquire, and participated in the trial of the case.

(d) Corey Bishop died on September 17, 1956, and his estate was substituted as a party defendant with the aforesaid Ethel May Bishop as administratrix.

The subject matter of this litigation is real property located in the Virgin Islands.

The facts of the case are as follows: Prior to 1938, the defendants, Ethel May Pressey Below and Corey Bishop, were husband and wife in the State of New York, and the correct surname of both was "Below." On or about April, 1938, the husband, Below, deserted his wife and daughter and came to the Virgin Islands with the plaintiff whose

name was Mildred T. Bishop. He assumed the name of Corey Bishop, and he and the plaintiff lived together in the Virgin Islands as husband and wife under the name of Mr. and Mrs. Corey Bishop from April, 1938 to December, 1954. His wife, Ethel May Below (who now has also assumed the name of Ethel May Bishop) made unsuccessful efforts to find him and considering him dead, married again, was later divorced and later married again.

During this period, from 1938 to 1954, Mildred T. Bishop and Corey Bishop, in St. Thomas, worked together, and from their joint efforts, acquired together, as tenants in common, certain lands on the Island of St. John, some of which they subsequently sold, but of which on April 16, 1955, they still owned approximately 55 acres. On that date, they owned, and held title to, the said 55 acres jointly as tenants in common. Some time prior to April 16, 1955, the wife, Ethel May Bishop, discovered her husband's whereabouts, and a few days before April 16, 1955, her attorney, the defendant, George T. Kelly III, came to the Virgin Islands and contacted the defendant, Corey Bishop. Thereupon, on April 16, 1955, Corey Bishop came to Mildred T. Bishop with the trust deed in question herein (Corey Bishop and Mildred T. Bishop were then separated) and induced her to sign the same, which instrument names George T. Kelly III as trustee, but contains no cestui que trust or beneficiary. The only evidence in the case of what inducement was made to the plaintiff to get her to sign is the testimony of the plaintiff, who states that Corey Bishop told her that his wife had found him and that the only way to keep his and her names from being dragged through the mud and save their property was to transfer it to a trustee to hold for them; that at the time she signed the trust deed of April 16, 1955, she had no knowledge that the George T. Kelly III, named therein, was his wife's lawyer, but was told that he was a friend who would hold the property for them. This is not denied by George T. Kelly III, defendant herein, who neither appeared, nor answered, nor testified herein. It is also not denied by

Corey Bishop in his answer. It is also not denied by Ethel May Bishop in her testimony.

The following instruments have played a part in the arguments in this case, so it would be well to enumerate them in order:

1. Exhibit Number 5, trust deed, dated April 16, 1955, in which Corey Bishop and Mildred T. Bishop transferred the land in question to George T. Kelly III as trustee. This trust deed names no cestui que trust or beneficiary, and no terms or conditions of the trust.

2. (Not in evidence.) A certain declaration of trust, made by George T. Kelly III, and dated April 26, 1955, in which he declares that he is holding the said property in trust for Ethel May Bishop for her lifetime, with remainder to her daughter, Rosemary Fallonstein. This was not signed by Mildred T. Bishop. It was the sole act of George T. Kelly III, signed and proclaimed only by George T. Kelly III. Plaintiff alleges this instrument in her complaint, but did not put the same in evidence. The defendants' attorney was asked if he wished to put it in evidence and declined to do so.

3. Exhibit K, dated April 29, 1955, is a settlement agreement between defendants Ethel May Bishop and Corey Bishop, made in New York State, the pertinent part of which is quoted as follows: "That the said husband, in addition to the lands and stocks heretofore conveyed to the said George T. Kelly III, Trustees, does hereby sell, assign, convey, set over, transfer, deed, devise and demise unto the said wife one-half (½) of all property, real, personal or mixed, tangible or intangible, of whatsoever kind or nature and wheresoever located, of which he is now possessed, to be hers absolutely. Stock held by the said husband in Antilles Enterprises, Inc., shall be excluded from this agreement. It is the intention of the parties hereto by virtue of this paragraph of this agreement that all the worldly possessions of the said husband, as of the day and

date of this agreement, shall be equally divided between these parties, each to own one-half (½) as his or her sole or separate property and each of the said parties forever releases and discharges the other from any further or other claim or demand against all property of the other."

This settlement agreement provides that it is "in consideration of this agreement." As stated in the paragraph above that, the wife, Ethel May Bishop, releases any dower rights which she may have had in property sold by Corey Bishop previously, and provides that "It is the essence of this agreement that the parties hereto are about to effect a reconciliation and enter into a resumption of normal marital relationships."

4. Exhibit Number 6, dated July 27, 1955. This is an instrument made by Corey Bishop, Ethel May Pressey Below (sometimes known as Ethel May Bishop), Rosemary Fallonstein (sometimes known as Rosemary Fallon), and Leo Fallonstein, (sometimes known as Leo Fallon), her husband, and is a very interesting document. It purports to now revoke the trust deed of April 16, 1955, and Corey Bishop as the party of the first part now conveys the property in question in this litigation to the Ethel May Bishop named above as one of the parties of the second part. It does not mention Mildred T. Bishop at all, but states that whereas "Corey Bishop executed and delivered a deed to George T. Kelly III, Trustee," and whereas "The said deed and assignment were executed and delivered to said grantee as trustee and not otherwise," and where the parties named above "now desire to revoke, terminate and cancel the said trust, and to convey, assign and transfer all of the said properties involved in the said trust unto the said Ethel May Bishop, in fee simple and absolutely, free of the said trust and free of all claims, right, title and interests of all of the other parties mentioned in the said trust," and that "Corey Bishop, now in consideration of love and affection and $10 in hand paid herein, grants, bar-

gains, sells and conveys the property to Ethel May Bishop." It further states "That the said George T. Kelly III, who was formerly the *alleged* (italic mine) trustee of the aforesaid trust was not made a party to this instrument because he claimed no interest, and had no interest in the properties involved." Leo and Rosemary Fallonstein were also designated as parties of the second part, but signed as witnesses. Rosemary Fallonstein is the daughter of Ethel May Bishop, who was designated by the George T. Kelly III in his declaration of trust as the remainderman after her mother, Ethel May Bishop, but this instrument purports to cancel that declaration of trust, and conveys the fee to Ethel May Bishop.

It must be noted that in all of these instruments Mildred T. Bishop was a party to none of them, except the first trust deed to George T. Kelly III, and that the declaration of trust followed ten days later, the settlement agreement three days later, and the cancellation of trust three months later.

Plaintiff has asked for cancellation of all of these instruments. We need here to give attention only to the trust deed of April 16, 1955, for if that instrument is void, as far as Mildred T. Bishop is concerned, all subsequent instruments are also invalid as far as Mildred T. Bishop is concerned, since they stem from the original trust deed of April 16, 1955.

Plaintiff has argued that the trust deed of April 16, 1955 should be cancelled as to Mildred T. Bishop for two reasons. First, that her execution of the same was obtained by Corey Bishop by fraud and misrepresentation. Second, that the said trust deed is invalid, since it contained no cestui que trust or beneficiary named by the settlers.

As to the first, we have in evidence the testimony of the plaintiff, and the Court finds upon that testimony that the reason she was induced to convey her interest in the property to George T. Kelly III as trustee by the instrument in

which no beneficiary or cestui que trust was named, was because of the fraudulent or false representations made to her. Further evidence supporting her testimony shows that, at the time she was induced to sign this instrument, she and Corey Bishop were estranged. She was also trying to get Corey Bishop to make over a settlement to her as well as was the other wife. It is therefore not reasonable that while she was trying to get him to make over a settlement to her that she would give up the property, which she already had, for him to give to the other. Furthermore, Corey Bishop's actions throughout show that he never intended to be fair with either of these two women, and that he betrayed either of them where it suited his purposes. And when he died on September 17, 1956, he left both of them stranded.

Further evidence of the truth of plaintiff's claim is the fact that no beneficiary was named in the instrument which she signed. Defendant Ethel May Bishop's attorney argues that the reason for that omission was that Ethel May Below, or Bishop, had not decided what name she would use. This is weak, however, since the cestui que trust could easily have been described sufficiently to indentify her. Furthermore, when her attorney made the declaration of trust soon thereafter, she was named, and she was named in every other instrument not signed by the plaintiff. It is therefore significant that the only instrument in which Ethel May Bishop, or Ethel May Below, is not mentioned by name, is the one plaintiff signed. In all of the others, she is designated as Ethel May Below, or Ethel May Bishop, indiscriminately, or both. In addition, in his answer of September 11th, Corey Bishop does not deny this allegation in the complaint of his misrepresentation and fraud of the plaintiff herein.

Defendants' attorney argues that this defendant was a bona fide purchaser for value in that she waived her dower rights in property previously sold by Corey Bishop in consideration of this trust deed, and that therefore any fraud

on the part of Corey Bishop cannot affect this deed to Ethel May Bishop. This is not borne out by the evidence. Exhibit K, above, which is a settlement agreement between Corey Bishop and Ethel May Bishop, expresses between them the precise consideration for that waiver of dower to be the transfer by the said Corey Bishop of one-half (½) interest in all of his property. It, however, states that the above consideration was "in addition" to this transfer. But Ethel May Bishop knew at the time and had notice that one-half (½) of this property in question belonged to Mildred T. Bishop, and that no part of the consideration between herself and her husband went to the said Mildred T. Bishop. Her agent and attorney, George T. Kelly III, well knew that no consideration had been paid to Mildred T. Bishop. He was in St. Thomas at the time this trust deed was obtained from Mildred T. Bishop, and from its language it seems to have been drawn by an attorney, and George T. Kelly III was the only attorney involved. This Court has noted the difference in the tone of this trust deed from the tone of Exhibit 6, which latter instrument was probably not drawn by any attorney. George T. Kelly III was here to see to it that Corey Bishop obtained this deed from Mildred T. Bishop. He and Corey Bishop went to great lengths not to make a simple quit claim deed to Ethel May Bishop, for Mildred T. Bishop would then have seen that it was to go to Ethel May Bishop, and they were careful not to put Ethel May Bishop's name into a deed for Mildred T. Bishop to see. George T. Kelly III was Ethel May Bishop's attorney and agent with full power of attorney from her to act fully in her behalf in obtaining the deed, and so acted. Consequently, although he may not have personally made any of the false representations to Mildred T. Bishop, he aided in them and made them possible by keeping Ethel May Bishop's name out of the original trust deed, and by handling the transaction so that her name need not be known until he made his declaration of trust ten days later. He acted as Ethel May

Bishop's agent with full power of attorney to act for her. Therefore, his acts became her own acts. She is here attempting to disavow these fraudulent acts of her agents, but to keep all benefits therefrom.

Furthermore, Ethel May Bishop's testimony shows that there were several conferences in Florida between herself, Corey Bishop and her attorney, George T. Kelly III, concerning this matter and what they should do about it. Therefore, she also had actual knowledge of what was being considered and done in the matter by her agent and Corey Bishop, and when he came to St. Thomas, she gave George T. Kelly III full authority to act for her, and he came to St. Thomas for the purpose of obtaining this property.

It seems to have been discussed in Miami, Florida, and decided that, instead of drawing a simple quit claim deed from Corey and Mildred T. Bishop to Ethel May Bishop, to which Mildred T. Bishop would have objected, that it be handled in this round about manner, to wit: To first obtain Mildred T. Bishop's signature to the instrument of April 16, 1955, by some means without the name of Ethel May Bishop appearing thereon, which would have been noticed by Mildred T. Bishop, but to put in a trustee, then after the trustee obtained it, the property could then be transferred to Ethel May Bishop. It therefore seems almost impossible to see how Ethel May Bishop's attorney and agent could come to St. Thomas and participate in this trust deed with no beneficiary, then later make a declaration of trust, naming Ethel May Bishop, without having full knowledge of what was being done, to say the least, even if it were not the plan of all three as a result of the Florida conference. It seems to this Court that this manner of handling this transaction, instead of obtaining a simple and straightforward quit claim deed from Corey Bishop and Mildred T. Bishop to Ethel May Bishop, after the conferences in Florida concerning the matter on the part of all three of them, and George T. Kelly III, her

agent and attorney's subsequent presence in the Virgin Islands, sounds of fraud on the part of all concerned. It certainly seems to have been a round about plan to obtain Mildred T. Bishop's signature without disclosing the name of Ethel May Bishop, and thereby obtaining Mildred T. Bishop's half, since she was not a legal wife.

Next, with respect to plaintiff's second argument, to wit: That the trust deed of April 16, 1955, was of no force and effect in that it named no conditions of the trust and named no cestui que trust; this Court is in agreement:

Counsel for the defendant argues (without any cited authority) that all the requirements of a trust were supplied and are present in the declaration of trust made by George T. Kelly III, and that since the trustee has stated all of this in his declaration of trust, that this fulfills the requirements in behalf of the settlers, and that it makes no difference that the settlers did not do so in the instrument of April 16, 1955. Also, that these conditions need not be put into the deed of trust; that it is sufficient that they were put in the declaration of trust by the trustee. First, it must be remembered that the declaration of trust, made by the trustee, is not in evidence. However, if we consider the declaration of trust made by the trustee as being in evidence and considering the circumstances of this case outlined above, defendant's argument is tantamount to saying that the settlers need not express either the conditions of the trust or name the cestui que trust or beneficiaries, but that such discretion may be left to a trustee. In this connection, also, it must be noted that the trustee declared a trust in favor of Ethel May Bishop only for life, with a remainder to Rosemary Fallonstein, while in the document of July 25th (Exhibit 6) Corey Bishop, one of the settlers, canceled that and transferred it to Ethel May Bishop in fee, whereas, Mildred T. Bishop the other one of the settlers, testified that it was intended for none of these, but for herself and Corey Bishop. Also, it must be noted that the trust deed of April 16, 1955, (Exhibit 5) did not express any of the conditions of a trust,

or give to George T. Kelly III the discretion of naming the beneficiaries thereunder. Nor did it give to Corey Bishop and Ethel May Bishop the power to cancel it and take the fee as they attempted to do in the instrument of July 25th (Exhibit 6), and that neither of the settlers signed the declaration of trust as made by George T. Kelly III, and neither of them agreed with his disposition of same, to wit: A life interest to Ethel May Bishop, with a remainder to Rosemary Fallonstein. In the instant case, no conditions whatever were set up by the settlers at the time of execution of the deed of trust, and no beneficiary named. Mildred T. Bishop, one of the settlers, never at anytime made or signed any other agreement.

It seems clear to this Court that to create a valid trust, the beneficiaries of the same must be named by the settlers of the trust. This was not done by the settlers in the instrument of April 16, 1955, the only instrument executed by them.

In Levy v. Levy, 33 N. Y. 97, 107, the principle is clearly stated. There the court said, "If there be a single postulate of the common law established by an unbroken line of decision, it is that a trust without a certain beneficiary who can claim its enforcement is void, whether good or bad, wise or unwise." See also U. S. v. Oregon, 186 Fed. Reporter 863. And in Newhall, et al. v. McGill, 212 Pacific Reporter 764, the court held, "A valid trust must have subject matter that is certain, and beneficiaries specifically designated." Thompson on Wills, 2d Ed., see 419, Page 36.

This failure to state the purpose of the trust and to name the beneficiaries by the settlers in the instrument of April 16, 1955, cannot be cured by the trustee later making a declaration of trust himself, and himself therein naming beneficiaries. Practically all the authorities hold that the trustee does not have that power or discretion to do so. The beneficiaries must be named by the settlers and not the trustee otherwise uncertainty exists in the instrument conveying the property to the trustee. This rule of uncertainty is clearly stated in 54 Am. Jur. 136 as follows: "Uncer-

tainty exists within the rule and prevents the creation of a valid trust where the trustee can select or change beneficiaries at his absolute discretion." 54 Am. Jur. 136, Wilce v. Van Anden, 248 Ill. 358; Nichols v. Allen, 130 Maas (sic) 211; Kramer v. Sommers, 93 SW 2d 460; Re Long, 100 Wash. 196. See also Re Ralston, 96 A. L. R. Page 954, which states the same rule as follows: "A trust is not impressed upon the testator's property by provisions in the will stating that the testator gives and bequeaths 'in trust' to a certain person, who is named executor, his entire property, real and personal, and that he gives such person absolute power to dispose of the estate as he may see fit, there being a failure of the trust or the persons to benefit thereby."

This Court is therefore of the opinion that George T. Kelly, III, trustee, had no power or authority to designate the beneficiaries thereunder, but that the trust attempted to be created on April 16, 1955, failed for the reason that the settlers thereof designated no conditions and no beneficiaries and that the deed of April 16, 1955, is void.

This conveyance by Mildred T. Bishop was intended to be a trust of some kind and not an absolute deed. This is conceded by both parties to this case, and confirmed by the action of George T. Kelly, III, trustee, by his purported declaration of April 26, 1955.

Therefore, this Court is of the opinion that the plaintiff herein, Mildred T. Bishop, did not set up a trust of her one-half (½) interest in the property involved herein in favor of Ethel May Bishop or Rosemary Fallonstein or anyone else; that the deed of April 16, 1955, is invalid and does not convey her half interest in the same to George T. Kelly, III as trustee or otherwise, or to anyone else; and therefore none of the subsequent instruments in any manner conveyed her one-half (½) interest, to which said one-half (½) interest she is still possessed and entitled.

Defendant was allowed to amend her complaint after trial to include the defense of laches, upon her counsel's

argument that he wanted that defense only for the purpose of showing the length of time having elapsed (sic) between the time plaintiff had notice of the declaration of trust and the time of filing suit as an argument that plaintiff accepted and resigned herself to the transfer. However, the rule supported by the weight of authority is that delay in asserting a right does not of itself constitute laches, 30 C. J. S. 531, Sec. 116. This delay will not bar relief when it has not worked injury, prejudice or disadvantage to defendant or others adversely interested, ibid. 534. Time is not the only element of laches. As long as the parties are in the same condition, it matters little whether one presses a right promptly or slowly, 30 C. J. S. 536.

In view of the above, this Court is of the opinion that plaintiff is entitled to a decree of the following:

1. That the deed of April 16, 1955, signed by Corey Bishop and Mildred T. Bishop is null and void, insofar as it purports to convey the one-half (½) interest of Mildred T. Bishop in the property involved.

2. That none of the other instruments above had the effect of conveying her said one-half (½) interest in the property involved.

3. That Mildred T. Bishop is ADJUDGED and DECREED to be the owner of an undivided one-half (½) interest in the property involved in this litigation.

Order may be drawn in accordance with this opinion.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and caused the Seal of the Court to be affixed this 28th day of June, 1957.

/s/ HERMAN E. MOORE.
HERMAN E. MOORE
District Judge

ATTEST:

/s/ GEORGE A. MENA
GEORGE A. MENA
Clerk of the Court

Opinion of Court of Appeals

(Filed May 1, 1958)

Before MARIS, MAGRUDER and STALEY, *Circuit Judges.*

By MARIS, *Circuit Judge.*

The defendant, Ethel May Bishop, widow of Cory Bishop and the administratrix c.t.a. of his estate, appeals from the judgment of the District Court of the Virgin Islands cancelling a deed executed by Cory Bishop and the plaintiff, Mildred T. Bishop, which conveyed to George T. Kelly III, Trustee, their interests in 55 acres of real property located on the island of St. John and known as Catherineberg or Hammerfarm. To understand the nature of the questions which the appeal presents an account of the relations between the parties and the circumstances under which the controversy arose is necessary. From the uncontradicted evidence and the admissions in the pleadings the following facts appear:

Cornelius Comstock Below, who later called himself Cory Bishop, in 1925 married Ethel May Pressey, sometimes later known as Ethel May Bishop. A daughter, Rosemary, was born of the marriage. Cory deserted his wife and child in 1939. The latter were in Florida at the time and it appears that Cory sent them a letter from New York saying that he had failed them, that he was sorry, and enclosing a receipt for paid-up insurance. Thereafter Ethel May tried unsuccessfully to locate him and later was told that he was dead.

The plaintiff, Mildred T. Bishop, met Cory in New York City in 193[illegible]. She knew that he was a married man. Later he told her that his wife had left for Florida and that they were divorced. Cory then assumed the name "Cory Bishop" and Mildred testified that they were married by a justice of the peace in New York State in October, 1939. On July 19, 1940, they arrived in St. Thomas and

opened a joint checking account under the names of Cory Bishop and Mildred T. Bishop in the Virgin Islands National Bank. Into their joint account were deposited their earnings, together with $1200 which Mildred received each year from her divorced husband, Wallace Bishop. On May 18, 1945, they purchased the property on the island of St. John known as Catherineberg or Hammerfarm. Four parcels of this property were sold by them during the ensuing years and about 55 acres were retained. They improved this land, purchased equipment and farmed it. Mildred took care of the gathering and marketing of the farm produce and the income therefrom was deposited into their joint account.

In 1953 Cory organized a corporation, Antilles Enterprises, Inc., and Mildred during this period worked in the office with him at 8 Crystal Gade in St. Thomas. 800 to 900 acres of land belonging to them were conveyed to the corporation by deeds in which Mildred waived any dower rights. In 1954 and 1955 it appears that negotiations were in progress from the results of which Cory and his associates in the corporation hoped to realize very large sums of money.

In the fall of 1954 Cory and Mildred had personal difficulties and became estranged. They separated on December 25, 1954. Negotiations were then started by their counsel to effect an agreement for separation and support for Mildred. During the months of January and February, 1955, Cory paid Mildred $500 a month for her support. No formal agreement was arrived at, however.

In the meantime Ethel May had remarried in 1949, had been divorced three months later, and in 1952 had remarried again. After Cory's father died, his family in 1954 started a search for Cory and it was discovered that he was alive and residing in the Virgin Islands. Ethel May learned of this and gave the information to her attorney, George F. Kelly III, Esq., of Orlando, Florida. Mr. Kelly, under date of March 2, 1955, wrote to William W. Bailey, Esq., an

attorney in St. Thomas, inquiring about Cornelius Comstock Below. Mr. Bailey answered, under date of March 11th, saying that he was unable to locate Cornelius, that the building at 8 Crystal Gade, the address given in Mr. Kelly's letter at which Cornelius was thought to reside, was occupied by a client of Mr. Bailey's law firm, and he asked for more helpful information. On March 14th Mr. Kelly advised Mr. Bailey that Cornelius was using the name Cory Bishop, to which Mr. Bailey replied on March 17th stating in part:

> "Mr. Corey Bishop has been known to this firm for many years and is presently a valued client of this office. As a matter of fact, the day that I was investigating the whereabouts of Cornelius Comstock Below, prior to my letter of March 11th, I had occasion to talk with Mr. Corey Bishop who has an office and lives at No. 8 Crystal Gade and asked him if he knew a Cornelius Comstock Below, which he denied. Yesterday, Mr. Corey Bishop left for the States on a ten-day business trip, but it may be that my innocent conversation with him, which I have related above, may cause him to contact Mrs. June [1] Below, and we would appreciate being advised of this fact."

Cory did contact Ethel May in Florida on April 8, 1955. She testified that at this time he professed his love for her, asked for an opportunity to make up for the past sixteen years, and hoped that she would come to live with him. Shortly thereafter she divorced the man whom she had married in 1952. Cory said he would give her the 55 acres of land he owned with Mildred in the Virgin Islands, which Mildred would convey with him, that he held stock in Antilles Enterprises on which he expected to realize half a million dollars of which he would give Ethel May

[1] It appears from the evidence that Ethel May's nickname was "June".

one-half, and that he had settled $5,000 on Mildred who had left St. Thomas for the States. He explained that he and Mildred had conveyed land prior to March 1, 1955 in the Virgin Islands and that Ethel May's waiver of her dower rights in that land was required [2] and he asked her to sign certain documents which he had brought with him, using the name "Ethel May Bishop". She did not sign any waivers at that time, however, but requested her attorney, Mr. Kelly, to go to the Virgin Islands to investigate the situation. On April 14th, when Mr. Kelly was leaving Orlando for the Virgin Islands, Ethel May executed a power of attorney to him in which she gave him full power to act on her behalf, to transact every kind of business for her, to release any claim of dower or other claims of any kind she might have, to enter into agreements of any kind with her husband, Cory Bishop, and she granted Mr. Kelly full power and authority to "hold stock, real property or other property in his own name". To this document she affixed the signatures "Ethel May Below" and "Ethel May Bishop".

Mr. Kelly, Cory and Mr. Bailey, Cory's attorney, had arranged to meet in St. Thomas on April 15th and they conferred on that day and on the 16th. In the course of these conferences Mr. Bailey prepared the deed which Mildred now seeks to have set aside as invalid. That deed purported to convey the remaining 55 acres of the property known as Catherineberg or Hammerfarm, which Cory and Mildred owned in St. John, to Mr. Kelly as Trustee but did not declare the terms of trust or name the beneficiaries of the trust. Cory took this deed to Mildred in order to obtain her signature to it. As to what took place at this meeting between Cory and herself Mildred testified:

> "He came to my apartment on the day of April 16th in a very terrible state. He was crying; he was

[2] Under Section 15, Chapter 15, Title II, of the Code of St. Thomas and St. John, then in force, an instrument executed without the signature of the spouse conveyed only the interest of the one executing it and the grantee took subject to the dower or curtesy right of the one who did not join in executing the instrument.

terrible careless; he hit his head against the wall; he told me that I had apparently never been married to him. His wife had turned up. He was going to be in a terrible difficulty. He referred to the word 'blackmail'. He told me the only way to help him and to protect my interest would be for me to place it in trust—from what I understand, a trust is something that keeps things from people. I had no reason at that time to distrust Corey. He was in distress, and I felt that it was a terrible thing to have two wives, and I trusted him. * * *

* * *

* * * he said that it was the only possible way to place this in trust so that his wife couldn't take my part of it. * * *

* * * Corey came to me in a very, very upset state. He cried. His eyes were already red. He was most hysterical and he told me that he had—you know, not told me the truth; that the defendant had not divorced him, and that apparently I was never his wife. He said—you know—most awful things could be done to him, and so forth. Naturally, my interest was to help Corey. It always has been. He explained to me it was a trust in which Catherineberg, the farm was put. My interest, which I always had with him, my share of the interest which we had together in Catherineberg would then be protected, and that the defendant could not secure my property, and that was a trust that sounded logical to me. I saw a man whom I never met or heard the name of before, Mr. George Kelly, listed as Trustee, I'm not an attorney. I took it for granted. I always trusted Corey. I saw no reason not to—that this awful thing had befallen him. The first thing that he would protect me, and for my protection I would sign it. * * *

* * *

• • • It just merely says that Mr. Kelly—it seems to me, would hold in trust this farm for Corey and myself. • • •

I hadn't any idea who Mr. Kelly was. I found out the next day that Mr. Kelly was the defendant's attorney at the time—

• • •

He had already told me that this was a dependable person, and in which we would put Catherineberg in trust, so that my share of it could be protected for me and would be out of reach of the defendant to touch.

• • • He was putting in trust in Mr. Kelly's name our farm for us—for both of us—that he explained putting in trust.

• • •

• • • I don't say that he used exactly those words—to protect our interest.

• • •

Corey was about to have a very large business organization and it isn't considered proper to have two wives at the same time, and all of this was to protect me, and make it possible for him to remain—retain his position and to pay the defendant. He said she was demanding money."

At the meeting which she thus described Mildred signed the deed and it was duly acknowledged, delivered and recorded. Cory left the Virgin Islands shortly thereafter and never returned. Several letters from Mildred to Cory and one from Cory to Mildred subsequent to April 16th, which were offered in evidence, indicate that their relations were friendly at the time he departed.

On April 26th Kelly executed a declaration of trust formally declaring that he held the property in St. John and 10 shares of stock of Antilles Enterprises which Cory

had also assigned to him, in trust for Ethel May for life with remainder to her daughter, Rosemary.

On April 29th a reconciliation agreement was entered into between Cory and Ethel May by which he conveyed to her a one-half interest in all his property with the exception of the stock he held in Antilles Enterprises, this conveyance to be in addition to the land in St. John which he had previously conveyed, and the 10 shares of Antilles Enterprises which he had previously assigned, to Mr. Kelly as trustee. Ethel May thereby agreed to release all her dower rights in the property of her husband. On the same date Ethel May Bishop executed a release of her dower rights in any land situated in the Virgin Islands or elsewhere which had been conveyed by her husband, either individually or jointly, prior to March 1, 1955. This release was subsequently recorded in the Virgin Islands.

In July, 1955, Cory, Ethel May, their daughter, Rosemany Fallonstein, and her husband, Leo Fallonstein, joined in executing an instrument entitled "Revocation of Trust, Conveyance and Assignment to Ethel May Bishop", which terminated the trust which Mr. Kelly had declared in favor of Ethel May for life with remainder to her daughter, discharged the trustee and conveyed the entire title to the trust property to Ethel May in fee simple, free of said trust.

Ethel May arrived in the Virgin Islands sometime in 1956, claimed the land in St. John, and occupied it. On June 25, 1956, Mildred instituted the present suit against Cory, Mr. Kelly and Ethel May alleging, inter alia, that Cory on April 16, 1955 told her he was in great difficulty and represented that she was in great danger of losing her interest in the property and that he intended to protect her and save himself from great financial harm by putting the property in trust for her, and that she had the utmost trust and confidence in him and was thereby induced to sign the deed in which Mr. Kelly was designated to hold the property as trustee. She claimed that the representations made by Cory were false and were made with intent to defraud her. She

accordingly asked the district court to cancel the deed of April 16, 1955, as well as two other instruments, the declaration of trust made by Mr. Kelly on April 26, 1955, and the revocation of the trust executed in July, 1955. In an amended complaint she also sought partition of the property.

Ethel May filed an answer alleging that the complaint failed to state a cause of action against her. Cory filed an answer on September 13, 1956 admitting that Mildred had acquired the land in question with him and that he had terminated the trust. All other allegations he neither admitted nor denied. Cory died by his own hand four days later and Ethel May, as the administratrix c.t.a. of his estate, was substituted as party defendant. The Virgin Islands National Bank, holder of a mortgage on the property here involved, was added as a party defendant.

Following the trial of the case at which the foregoing facts appeared the district court found that Cory, Mr. Kelly and Ethel May were all guilty of a fraud upon Mildred in inducing her to sign the deed in question. A judgment was entered declaring, inter alia, the deed of April 16, 1955 null and void insofar as it purported, to convey Mildred's undivided one-half interest in the land in question and decreeing that Mildred was entitled to partition of the property. The court further declared the Revocation of Trust, Conveyance and Assignment to Ethel May Bishop to be null and void insofar as it purported to convey to her Mildred's one-half interest in the land. 152 F. Supp. 4. This appeal by Ethel May, individually, and as Administratrix c.t.a. of the Estate of Cory Bishop, followed.[3]

In considering this appeal we are met at the outset with the question whether under the facts of this case Mildred

[3] On March 28, 1957 the district court granted Mildred leave to amend her complaint and add thereto a claim to her interest in certain property purchased by Cory and herself to equip the farm. No relief was granted by the judgment with respect to this property, however, and no question is raised on appeal as to it.

may invoke the aid of the courts to secure the equitable relief which she seeks.

It is an ancient and established maxim of equity jurisprudence that he who comes into equity must come with clean hands. If a party seeks relief in equity, he must be able to show that on his part there has been honesty and fair dealing. Wheeler v. Sage, 1863, 68 U. S. 518, 529. Equity will not ordinarily aid a person to secure relief from a situation which results from the conveyance of his property in fraud of creditors or other persons claiming it. Dent v. Ferguson, 1889, 132 U. S. 50, 64-66; De Matteo v. Flanigan, 1943, 134 N. J. Eq. 198, 34 A. 2d 744; 19 Am. Jur., Equity §§ 469, 472. Moreover, the unconscionable character of a transaction need not be pleaded or set up as a defense. Whenever it is disclosed the court will of its own motion apply the maxim. Frank Adam Electric Co. v. Westinghouse Elec. Mfg. Co., 8 Cir., 1945, 146 F. 2d 165; Gluck v. Rynda Development Co., 1926, 99 N. J. Eq. 788, 134 A. 363, affirmed 100 N. J. Eq. 534, 135 A. 917; 30 C. J. S. Equity § 97. In Precision Co. v. Automotive Co., 1945, 324 U. S. 806, the Supreme Court said (pp. 814-815):

> "The guiding doctrine in this case is the equitable maxim that 'he who comes into equity must come with clean hands.' This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however, improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abettor of iniquity.' *Bein* v. *Heath*, 6 How. 228, 247. Thus while 'equity does not demand that its suitors shall have led blameless lives,' *Loughran* v. *Loughran*,

292 U. S. 216, 229, as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue. *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S. 240, 245; *Johnson* v. *Yellow Cab Co.*, 321 U. S. 383, 387; 2 Pomeroy, Equity Jurisprudence (5th Ed.) §§ 379-399.

"This maxim necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant. It is 'not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion.' *Keystone Driller Co.* v. *General Excavator Co.*, *supra*, 245, 246. Accordingly one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim by the chancellor."

Turning to the facts of this case it will be seen from Mildred's own testimony as to what took place between Cory and herself that she signed the deed in question with the intention of putting title to the property in a secret trust in order to prevent Ethel May from obtaining the property. She testified: "He told me the only way to help him and to protect my interest would be for me to place it in trust—from what I understand, a trust is something that keeps things from people." Thus the deed was signed by her in circumstances which were far from honest and for the express purpose, as she thought, of defrauding Ethel May of property in which she was entitled to claim an interest. For it is obvious that Mildred thought that the way to help Cory was to defeat the claims of his wife, Ethel May, by conveying his property to a trustee to hold upon an undisclosed trust. And it is equally clear from her testi-

mony that she thought that Ethel May might have some sort of a claim to her own share of the property and that this also could be frustrated by the conveyance to the trustee. Otherwise Mildred, admittedly an experienced businesswoman, certainly would not have thought it necessary to carry through the devious procedure of attempting to conceal the ownership of herself and Cory by a conveyance of the property to a trustee upon an undisclosed trust.

The fact that Cory misrepresented to Mildred the purpose of the conveyance did not lessen her intent to defraud Ethel May of property to which she may have been entitled, but merely frustrated the successful consummation of her intended object. And it is the moral intent of a person in such a case as this, rather than any actual injury done, which determines whether he has come into court with clean hands. Hildebrand v. Willig, 1903, 64 N. J. Eq. 249, 53 A. 1035; Coleman v. Coleman, 1936, 48 Ariz. 337, 61 P. 2d 441, 106 A. L. R. 1309; 19 Am. Jur. Equity § 476. Here Mildred's intent to defraud Ethel May is plain, if her own testimony is to be believed. And if it is not to be believed and the fact is that she knew that the deed which she signed was to be for the benefit of Ethel May and she signed it at Cory's request in order to help him out of his desperate predicament, the result is the same. In either case she is not entitled to the assistance of a court of equity to strike down the conveyance.

This result would follow even if Ethel May had herself also been guilty of fraud as the district court found. For in such a case equity will leave the parties where it finds them. Blystone v. Blystone, 1865, 51 Pa. 373, 376; Gill v. Henry, 1880, 95 Pa. 388; Simon's Estate, 1902, 20 Pa. Super. 450; Brown v. Rowland, 1946, 137 N. J. Eq. 462, 45 A. 2d 592, affirmed 141 N. J. Eq. 358, 57 A. 2d 246; 19 Am. Jur. Equity § 478; 30 C. J. S. Equity § 94. But we do not have such a case here. On the contrary there is no evidence in the record to support the finding of the district court that

Ethel May or her lawyer, Mr. Kelly, participated in any way in the fraud which Mildred asserts was practiced upon her by Cory in inducing her to sign the deed in question on the strength of misrepresentations as to its purpose. Those findings accordingly cannot stand in any event. This is not to say that we do not fully agree with the finding of the district court that "Corey Bishop's actions throughout show that he never intended to be fair with either of these two women, and that he betrayed either of them when it suited his purposes." All the relevant evidence supports that finding. But as to Ethel May the evidence is entirely consistent with the fact that she, a wife, deserted and unsupported for 16 years, and her lawyer, Mr. Kelly, were seeking to secure redress from Cory for his long continued desertion and nonsupport as well as some tangible consideration for the release of her dower rights which he was pressing her to sign in order to clear the title to the land which he had previously conveyed to Antilles Enterprises, Inc. and others.

We conclude for the reasons stated that the district court erred in not dismissing the complaint. We, therefore, do not reach the other questions which the district court considered and which the parties have discussed on this appeal.

The judgment of the district court will be reversed and the cause will be remanded to that court with directions to dismiss the complaint.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Opinion of Court of Appeals on Petition for Rehearing

(Filed August 19, 1958)

Before BIGGS, *Chief Judge*, and MARIS, MAGRUDER, STALEY and HASTIE, *Circuit Judges*.

PER CURIAM:

A petition for rehearing has been filed which vigorously assails the opinion of the court. We have given careful consideration to the petition but are satisfied that it presents nothing which was not fully considered and, in the view of the judges who heard and decided the appeal, correctly decided by the court. For this reason and because four circuit judges have not requested rehearing in banc the petition for rehearing will be denied.

BIGGS, *Chief Judge*, dissenting.

My views in this case differ substantially from those of my colleagues:

(1) *As to Fraud:* There is ample evidence in the record to sustain the conclusion of the court below that Corey Bishop (Cornelius Below) induced Mildred Bishop by fraud to sign the deed naming Kelly, Ethel Bishop's attorney, as "trustee", and that Kelly was a party thereto, Mildred Bishop not knowing that Kelly was Ethel Bishop's lawyer. 152 F. Supp. 4, 7-8 (D.C.V.I. 1957). The fraud of an agent or attorney is imputable to his principal. The obvious reason, as the court below found, for not including the *cestui's* name in the "trust" deed was that Mildred Bishop would not have signed the deed had she known that it was for the benefit of Ethel Bishop.

Mildred Bishop owned Hammerfarm with Corey Bishop as a tenant-in-common. She had paid a substantial part of the purchase price. The court below so found and there is no substantial evidence to the contrary. Mildred Bishop believed that her interest in the property was in

jeopardy and that if the property were put in Kelly's hands as "trustee" both her interest and that of Corey would be protected from Ethel Bishop. The portions of Mildred Bishop's testimony quoted in the opinion of this court bear out this view and I think the emphasis laid in the opinion on but two of the many phrases used by Mildred Bishop, *viz.*, "a trust is something that keeps things from people", and "to protect our interest", cannot adequately support the conclusion drawn by this court that Mildred Bishop executed the deed to deprive Ethel Bishop of her dower right.

There is no evidence that Mildred Bishop executed the deed to Kelly to deprive Ethel Bishop of her dower right.[1] There is no substantial evidence of fraudulent intent on Mildred Bishop's part. Mildred Bishop's testimony considered as a whole, indicates that she was endeavoring to protect her own interest in the real estate.

The court below had both Mildred Bishop and Ethel Bishop before it. It had the opportunity to weigh their credibility. The question of Mildred Bishop's intent in executing the deed is a question of fact and this court has made its own finding in derogation of Rule 52(a), Fed. R. Civ. Proc., 28 U. S. C. A court of appeals is not a fact finding body.

Conceding that an ultimate conclusion of legal fraud presents a mixed issue of law and fact, here the finding of fact on which an ultimate conclusion of legal fraud would have had to be bottomed was not made by the court below. But even if this were not so I think it is clear that this court has abused legal discretion in overruling the conclusions of the District Court. These conclusions find overwhelming support in the evidence. That Mildred Bishop under all the circumstances would knowingly have conveyed her interest in Hammerfarm to Ethel Bishop strains credulity.

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[1] If, as was indeed the fact, Ethel Bishop was Corey Bishop's wife, the deed could not have deprived her of her dower right.

(2) *As to the Clean Hands Doctrine.* Assuming *arguendo* that this court is correct in its conclusions in respect to the issue of fraud referred to at "(1)," *supra*, nonetheless this court has incorrectly applied the clean hands doctrine. That doctrine is, of course, that where a conveyance of property has been executed with the purpose of defrauding creditors or others the grantor cannot attack the conveyance or obtain relief against it in a court of equity. But it is also the law that where a property owner conveys land to protect it against an alleged claim, where there is neither claimant nor legal claim, the doctrine does not apply. The record shows that no claim was made by Ethel Bishop as to Mildred Bishop's property and it is astonishing that in the complete absence of this operative fact this court nonetheless obliterates Mildred Bishop's own interest as a tenant-in-common in Hammerfarm. Ethel Bishop's dower right did not attach and could not have attached to Mildred Bishop's interest in the real estate held by her as a tenant in common with Corey.[2]

Most important of all, the Virgin Islands Code specifically provides, Vol. I, Title 1, Section 4, "The rules of the Common Law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts

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[2] It should be noted again that the property involved in this litigation was held by Mildred Bishop and Corey Bishop as tenants in common. While the characteristic attribute of a tenancy in common is a unity of possession, each share still constitutes a distinct estate. Thus while a claimant against a tenant in common can reach the particular debtor's interest in the co-tenancy, and thus may become a tenant in common with the debtor's co-tenants, or may cause a partition of the estate he cannot deprive the co-tenants of their property rights. Hay v. Crawford, 159 Kan. 723, 158 P. 2d 463 (1945); Altobelli v. Montesi, 300 Mass. 396, 15 N. E. 2d 463 (1938); Roston v. Huggins, 216 N. C. 386, 5 S. E. 2d 162 (1939); Koubek v. Tenos, 343 Pa. 409, 22 A. 2d 740 (1941).

of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary." While the Virgin Islands Code of 1957 was not in effect at the time of the happening of the events complained of in the case at bar nonetheless this court in Callwood v. Virgin Islands Nat'l Bk., 221 F. 2d 770 (3 Cir. 1953), had already ruled that the decisional law of the Virgin Islands in case there was no applicable statute or ordinance was that embodied in the common law as expressed by the Restatements. There is no substantial difference between the common law as incorporated in the Restatements and the common law of England as adopted and understood in the United States. See Davies v. Otty, 35 Beav. 208 (Eng. 1865); 1 Scott, Trusts § 63, pp. 569-570 (2d ed. 1956).[3]

The Restatement, Trusts, commenting on Section 63, pp. 200-201, provides: "[I]f the owner of a piece of land transfers it to another who agrees to hold it in trust for the transferor, and the purpose of the transferor in making the transfer was to prevent a judgment creditor from levying

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[3] See also Dearman v. Dearman, 4 Ala. 521 (1842); Berniker v. Berniker, 174 P. 2d 668 (Cal. App. 1946), affirmed, 30 Cal. 2d 439, 182 P. 2d 557 (1947); Vollaro v. Gargano, 97 Conn. 275, 116 A. 179 (1922); Rossow v. Peters, 277 Ill. 436, 115 N. E. 524 (1917); Warner v. Tullis, 206 Iowa 680, 218 N. W. 575 (1928); Hoff v. Hoff, 106 Kan. 542, 189 P. 613 (1920); Griffin v. Lopez, 5 Mart. 145 (La. 1817); Zak v. Zak, 305 Mass. 194, 25 N. E. 2d 169 (1940); Bloomingdale v. Chittenden, 74 Mich. 698, 42 N. W. 166 (1889); Burns v. Burns, 124 Minn. 176, 144 N. W. 761 (1913); Cook v. Mason, 353 Mo. 993, 185 S. W. 2d 793 (1945); Kidd v. Kidd, 210 Miss. 465, 49 So. 2d 824 (1951); Thompson v. Steinkamp, 120 Mont. 475, 187 P. 2d 1018 (1947); Cowles v. Cowles, 89 Neb. 327, 131 N. W. 738 (1911); Collins v. Schump, 16 N. Mex. 537, 120 P. 331 (1911); Tiedemann v. Tiedemann, 201 App. Div. 614, 194 N. Y. S. 782 (1922), aff'd without opinion, 236 N. Y. 534, 142 N. E. 273 (1923); Brady v. Ellison, 3 N. C. 348 (1804); Hickey v. Ross, 197 Okla. 543, 172 P. 2d 771 (1946); Hanscom v. Hanscom, 186 Ore. 541, 208 P. 2d 330 (1949); Rivera v. White, 94 Tex. 538, 63 S. W. 125 (1901); Abslag v. Bock, 139 Wash. 198, 246 P. 300 (1926); Wilcoxon v. Carrier, 132 W. Va. 637, 53 S. E. 2d 620 (1949).

execution upon the land, the transferor can compel the transferee to reconvey the land if it was a homestead of the transferor's upon which the creditor could not have levied execution." The Restatement aside, the great weight of authority is to the same effect.

Professor Austin Scott points out that while the settlor's state of mind in a case in which he attempts to defeat a creditor's claim is as bad as though the claim were enforceable, nonetheless the refusal of a remedy to the settlor under such circumstances operates to cause a forfeiture of property disproportionate to the degree of his wickedness and the extent of harm done by him. 1 Scott, Trusts § 63, pp. 569-570 (2d ed. 1956).

Professor Scott also shows that courts have been too ready to deny relief to the settlor without consideration of the injustice which results. He states, "There is no doubt that as between the parties it is more just to require the trustee to surrender the property to the settlor than to permit the trustee to keep it." 3 Scott, Trusts § 422, p. 2196 (1939 ed.). See also Wantulok v. Wantulok, 67 Wyo. 22, 214 P. 2d 447 (1950), reh. den., 223 P. 2d 1030; Thompson v. Steinkamp, 120 Mont. 475, 187 P. 2d 1018 (1947); Note, 44 Yale L. J. 173.

I think it is clear that when the Restatements of Trusts and Restitution were compiled, the American Law Institute adopted the principle of those decisions which precluded the forfeiture of the property of a transferor who attempted to prevent a person from enforcing a claim against the transferred property when the claim was non-existent or could not have been enforced against the property. In such cases the Restatement either allows the settlor to enforce the trust, Restatement, Trusts § 63, comment *b* to subsection (*1*), or, if the trust fails, to compel the trustee to reconvey the property to him. Restatement, Trusts § 422, comment

c. See also, Restatement, Restitution § 140 and 4 Scott, Trusts § 422 (2d ed. 1956).[4] [5]

"(3) *No valid Trust.* The so-called "trust" deed did not state the terms of the trust or name or describe a beneficiary. Ethel Bishop contended that the reason the *cestui* was not named was because she could not decide to use the name "Below" or the name "Bishop". A more obvious reason, as has been pointed out, suggests itself. But it is black letter law that a trust, other than one which is charitable or honorary, cannot be created in favor of a person who is not named in the trust deed, and that in such a case the express trust will fail and a resulting trust will arise immediately in favor of the settlor. 2 Scott, Trusts § 112 (2d ed. 1956).

The court's opinion therefore presents the anomaly of a court of equity employing the clean hands doctrine to preclude an attack on a fatally defective trust deed, one completely lacking in equity. This court permits an invalid trust to subsist and to work a forfeiture of the settlor's property and a windfall to a third party.

(4) *Conclusions.* The rulings of the court would seem to err in three major areas and dislocate general legal prin-

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[4] Corbin refers to the spectacle of another's unjust enrichment as perverting the unclean hands doctrine. 6 Corbin, Contracts § 1463, p. 828 (1951). Mr. Justice Black in Johnson v. Yellow Cab Co., 321 U. S. 383, 387 (1943) said: "The maxim that he who comes into equity must come with clean hands is not applied by way of punishment for an unclean litigant but 'upon considerations that make for the advancement of right and justice.' Keystone Driller Co. v. General Excavator Co., 290 U. S. 240, 245. It is not a rigid formula which 'trammels the free and just exercise of discretion.'"

[5] In conclusion upon this phase of the case I point out that but small emphasis was placed on the clean hands doctrine in the court below and there is but cursory reference to it in the briefs of the parties on appeal.

ciples and also the law of the Virgin Islands as heretofore carefully established by this very court. In my opinion there are special and important reasons why the decision of the court should not stand. Accordingly I dissent from the order denying rehearing.

Judge Hastie also dissents and joins in so much of this opinion as concerns the application of the doctrine of clean hands.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Judgment of Affirmance

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,431

MILDRED T. BISHOP

vs.

COREY BISHOP, GEORGE T. KELLY, 3D, ETHEL MAY PRESSEY BELOW, also known as ETHEL MAY BISHOP; VIRGIN ISLANDS NATIONAL BANK, and ETHEL MAY BISHOP, as Administratrix, c.t.a. of the Estate of Corey Bishop, deceased

ETHEL MAY BISHOP, individually and as Administratrix of the Estate of COREY BISHOP, deceased.

APPEAL FROM THE DISTRICT COURT OF THE VIRGIN ISLANDS DIVISION OF ST. THOMAS AND ST. JOHN

Present: MARIS, MAGRUDER and STALEY, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the District Court of the Virgin Islands, Division of St. Thomas, and St. John, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, and the cause remanded with directions to dismiss the complaint.

Attest:

IDA O. CRESKOFF,
Clerk.

May 1, 1958.

Order of Substitution

IN THE

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS & ST. JOHN AT CHARLOTTE AMALIE

Civil No. 119-1956

MILDRED T. BISHOP,

Plaintiff,

vs.

COREY BISHOP, et. al.,

Defendant.

ORDER

On the annexed motion of Harry Dreis it is hereby

ORDERED that Harry Dreis executor of the Estate of Mildred T. Bishop, deceased by and hereby is substituted in place of Mildred T. Bishop plaintiff, in the above entitled action.

Dated: Oct. 10, 1958.

WALTER A. GORDON,
Judge of the District Court of the Virgin Islands.